UNITES STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Crim. No. 3:02cr0377 (JBA)**
	:	
LaSHAUNDA CRYMES	:	

RULING ON DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE AND SET ASIDE CONVICTION AND SENTENCE [DOC # 45]

Defendant LaShaunda Crymes pleaded guilty before this Court on May 12, 2003, to a Substitute Information charging her with three counts of wire fraud in violation of 18 U.S.C. § 1343. She now challenges her conviction and sentence under 28 U.S.C. § 2255. For the reasons below, Defendant's petition is DENIED.

I. Factual and Procedural Background

Crymes was engaged in a fraudulent scheme to steal funds from charities and convert the money into gold coins. See Stipulation of Offense Conduct, Plea Agreement Letter [doc. #26] at 10. On December 4, 2002, Crymes sent a fax from a hotel in Ohio to a Merrill Lynch bank office in Middletown, Connecticut. Id. The fax requested that $225,000 be wired from the account of a charitable organization to an account assigned to the Tulving Company, a gold coin dealer, at the California Bank and Trust located in San Marcos, California. Merrill Lynch completed the wire transfer on that date. Id. On the same day, Crymes also

placed an order for 669 one-ounce $50 American Eagle Coins with the Tulving Company and instructed that the coins be sent to "Hazel Harrison" at an address she used in Ohio. Id. The coins were delivered on December 5, 9 and 10. Id.

On or about October 11, 2002, Crymes sent a fax to a Merrill Lynch office in New Canaan, Connecticut, requesting that $125,000 be wired from the account of another charitable organization to an account under the fictitious name of "Grenard Smith" at the American Express Centurion Bank in Midvale, Utah. Id. The wire transfer was completed on the date requested. Id. at 10-11. On or about October 14, 2002, Crymes placed an order with E-Gold for the purchase of $124,850.00 of gold, but Merill Lynch reclaimed the funds before the sale occurred. Id. at 11.

On or about November 20, 2002, Crymes sent a fax to a Merrill Lynch office located in Colorado requesting that $75,000 be wired from the account of a third charitable organization to a Bank One account held by Currency Today, an Ohio business. Id. The fax listed the name of "Hazel Harrison" in the memo line. The funds were transmitted on November 20, 2002, to the Currency Today account and later to Barclays Bank PLC in London, where most of the money eventually was recovered by Merrill Lynch. Id.

On December 14, 2002, Crymes was arrested in Ohio on an outstanding federal warrant unrelated to this case. She was detained at her workplace, an Avis rental car business at the

Cleveland airport. Later that day, acting on information supplied by Crymes' supervisor at Avis, agents of the Federal Bureau of Investigation (FBI) obtained a search warrant to examine the contents of Crymes' purse and her employee locker at Avis. Search Warrant, dated 12/14/02 [doc. #14], Ex. B. On December 16, 2002, agents obtained another search warrant, this time for a duffel bag that Crymes had left with a co-worker with whom she had been living for a month. Search Warrant, dated 12/16/02 [doc. #14], Ex. E. Altogether, agents discovered 609 one-ounce $50 American Eagle gold coins, three $10 American Eagle Gold coins, $6771.17 in cash, and a check from the Coin Shop payable to defendant for $6600.00. Stipulation of Offense Conduct, Plea Agreement Letter [doc. #26] at 10. These items were stipulated to be the proceeds of defendant's fraud against Merrill Lynch. Id.

On December 30, 2002, a grand jury in Hartford, Connecticut, indicted Crymes on one count of wire fraud in violation of 18 U.S.C. § 1343. Indictment [doc. #3]. On March 4, 2003, through her counsel, Crymes filed a motion to suppress evidence and statements. [doc. #14]. On March 20, 2003, a grand jury returned a Superseding Indictment charging the defendant with two counts of wire fraud in violation of the same statute. [doc. #17].

On May 12, 2003, Crymes pleaded guilty to a Substitute Information that charged her with three counts of wire fraud.

[Doc. #23]. She also stipulated to relevant conduct involving ten additional fraudulent transactions or attempted transactions. Plea Agreement Letter [doc. #26] at 4.

In addition, Crymes stipulated that she waived her right to appeal or collaterally attack her conviction or sentence. The written plea agreement stated:

> It is specifically agreed that the defendant will not appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 or a challenge to venue, the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed 37 months' imprisonment, even if the Court reaches a sentencing range permitting such a sentence by a Guideline analysis different from that specified [in the agreement]. The Government agrees not to appeal if a sentence of incarceration of 24 months or greater is imposed. Further, the defendant also waives any rights to pursue the issues presented in her motion to suppress evidence and statements that is currently pending before the Court. The defendant expressly acknowledges that she is waiving her appellate rights knowingly and intelligently. Furthermore, it is agreed that any appeal as to defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the agreed Guideline calculation.

Id. at p. 7 (emphasis in original).

On August 20, 2003, the Court sentenced Crymes to a term of 30 months incarceration and 3 years supervised release. The Court also ordered Crymes to pay restitution of $242,516.58 to Merrill Lynch. Sentencing Order [doc. #43].

Crymes now challenges her conviction and sentence through a habeas corpus petition under 28 U.S.C. § 2255. She claims that

she received ineffective assistance of counsel because her attorney misadvised her to abandon her suppression motion and enter into a plea agreement. Defendant states that she "reluctantly agreed" to sign the plea agreement after her attorney explained that she could face a much higher sentence if she did not plead guilty. Def. Mem. of Law [doc. # 45] at 4-5. She does not claim that when she pleaded guilty she failed to understand that the plea agreement required her to waive her right to appeal and collateral attack, nor does she claim that her attorney misadvised her regarding the right to appeal specifically. Rather, she argues that her attorney was ineffective because she had a winning suppression motion that her counsel should have pursued.

The Government responds that Crymes's § 2255 motion is barred explicitly by the terms of the plea agreement, and, in the alternative, that Crymes received effective assistance of counsel with respect to the suppression motion.

II. Discussion

A. Waiver of Right to Collateral Attack

The threshold issue is whether Crymes waived her right to collaterally attack her conviction and sentence. If so, her habeas corpus petition under 28 U.S.C. § 2255 must be dismissed. See United States v. Djelevic, 161 F.3d 104, 107 (2d Cir. 1998) (per curiam).

"It is by now well-established that a defendant's knowing and voluntary waiver of the right to appeal is generally enforceable." United States v. Hernandez, 242 F.3d 110, 113 (2d Cir. 2001); see also Djelevic, 161 F.3d at 106. In a few "very circumscribed" situations, "a defendant may have a valid claim that the waiver of appellate rights is unenforceable, such as when the waiver was not made knowingly, voluntarily, and competently, when the sentence was imposed based on constitutionally impermissible factors, such as ethnic, racial or other prohibited biases, when the government breached the plea agreement, or when the sentencing court failed to enunciate any rationale for the defendant's sentence ..." United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000) (internal citations omitted).

With respect to the first circumstance, the Second Circuit has held that "a waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which the waiver has been procured..." Frederick v. Warden, 308 F.3d 192, 195 (2d Cir. 2002) (emphasis supplied). Specifically, "a plea agreement containing a waiver of the right to appeal is not enforceable where the defendant claims that the plea agreement was entered into without effective assistance of counsel." Hernandez, 242 F.3d at 113-14. "The rationale is that the very product of the alleged ineffectiveness cannot fairly be

used to bar a claim of ineffective assistance of counsel." Id. at 114. Therefore, even where the terms of a waiver are unambiguous, a defendant would not be barred from challenging a conviction or sentence based on deficiencies in the plea allocution under Fed. R. Crim. P. 11, or based on the ineffectiveness of trial or appellate counsel in failing to raise a Rule 11 claim. Frederick, 308 F.3d at 196.

Given these principles, when a defendant brings an appeal or collateral attack despite having signed a waiver, the Court must undertake a two-step inquiry. First, the Court must determine whether the plea was knowing and voluntary, including whether the defendant received effective assistance of counsel in deciding whether to waive the right to appeal or bring a habeas petition. Second, the Court must determine whether, by its terms, the plea agreement specifically bars appeal or collateral attack of the conviction or sentence. See United States v. Ready, 82 F.3d 551, 556 (2d Cir. 1996).

Under the first prong, "a waiver of the right to appeal should only be enforced ... if the record clearly demonstrates that the waiver was both knowing (in the sense that the defendant fully understood the potential consequences of his waiver) and voluntary." Id. at 557 (internal quotation and citation omitted). There is ample evidence supporting the conclusion that Crymes knowingly, intelligently, and voluntarily waived her right

to appeal or collaterally attack her conviction and sentence. The Court inquired of Ms. Crymes on several occasions during the Change of Plea proceeding whether she understood that she was waiving these rights. See Tr., 5/12/03, at 17, 25-28, 35-37. First, the Court inquired of Crymes regarding her understanding of the consequences of the plea agreement:

> Court: ... You need to be very clear, there will be no trial of any kind and no right to appeal your conviction arising out of your guilty plea.
>
> ...
>
> I understand as part of your plea agreement with the government that you have waived your right, in fact, to pursue any of the issues presented in your motion to suppress and any statements currently before the Court and that you are waiving and giving up your right to take an appeal or collaterally attack any sentence that is 37 months incarceration or less.... Do you understand that?
>
> Defendant: Yes.

Tr., 5/12/03, at 17.

The Government addressed defendant's waiver a second time while explaining the contents of the plea agreement:

> Government: The Court has already gone through the waiver of right to indictment ... as well as her right to appeal. The right to appeal is important enough I would just like a moment to repeat, your Honor, the defendant is agreeing she will not directly appeal or collaterally appeal, which is commonly called a habeas motion, any sentence of imprisonment or the conviction if such sentence does not exceed 37 months imprisonment... . And again, as your Honor noted, she is waiving

and I believe formally withdrawing, her motion to suppress evidence, including her request for a Franks hearing on this case

...

Court: All right then, do you -- does the written plea agreement that you've signed that Mr. Miller [the Assistant U.S. Attorney] has outlined fully and accurately reflect your understanding of your agreement with the Government?

Defendant: Yes.

Court: Has anything been left out?

Defendant: No

Court: Is anything unclear to you?

Defendant: No.

Tr., 5/12/03, at 25-28.

Just before Crymes actually entered her guilty plea, the Court addressed the issue for a third time:

Court: Now, also extremely important is your waiver of certain appeal rights. Under certain circumstances if you thought that your -- this process were fundamentally flawed or you had not waived certain rights by your entry of a guilty plea, you might have a ground for an appeal... . But part of your plea agreement with the government is that you are giving up that right to appeal if ... the sentence that is imposed on your does not exceed 37 months... . You have acknowledged that you were waiving the right to appeal or to collaterally attack in what for federal defendants is known as a 2255 petition. You are waiving your right to attack collateral and direct appeal knowingly and voluntarily.

In any event, any notice of appeal must be filed 10 days from the entry of judgment,

which I told you would be on the day of sentencing. ...

So do you understand your rights that you will waive with respect to not only indictment and trial but to appeal and to collaterally attack your sentence under the circumstances you have agreed to here?

Defendant: Yes, your Honor.

Tr., 5/12/03, at 35-37.

Defendant Crymes also affirmed that she read and understood the terms of the plea agreement:

Court: I understand there is a written plea agreement. Would you put that in front of Ms. Crymes, please.

Have you read this agreement, Ms. Crymes?

Defendant: Yes, I have.

Court: And do you understand it?

Defendant: Yes, I do.

Tr., 5/12/03, at 18-19. This written plea agreement contains, as reprinted supra, § I, a full and explicit waiver of the right to appeal or collaterally attack the conviction or sentence provided that Crymes received a sentence not longer than 37 months imprisonment. Plea Agreement Letter [doc. #26] at 7. That provision of the waiver is underlined prominently.

At no point during the allocution did Crymes indicate that she did not understand that provision, that she wanted more time to discuss it with her attorney, or that she did not want to accept it. The written plea agreement itself stipulates that

"The defendant expressly acknowledges that she is waiving her appellate rights knowingly and intelligently." Id. After having read the plea agreement and stating at least three times during the Rule 11 hearing that she understood the consequences of waiving her right to appeal/collateral attack, the conclusion is inescapable that Crymes entered the plea agreement knowingly and voluntarily. The Court finds that Crymes fully understood that she was waiving her right to appeal or collaterally attack any sentence that did not exceed 37 months.[1]

This case is easily distinguishable from Ready, 82 F.3d at 557-58, in which the district court neglected to mention at the Rule 11 hearing that by pleading guilty the defendant was waiving his right to appeal, or that there could be consequences of waiving that right. The court had even suggested that the defendant might retain the right to appeal under the plea agreement. Id. at 558. Under these circumstances, the Second Circuit held that the waiver was not made knowingly. The transcript at Crymes's hearing, however, reveals very different circumstances; Crymes was fully advised that her plea agreement involved a waiver of the right to appeal/collaterally attack.

Crymes does not contend that her counsel was ineffective for

[1]The Court also notes, as probative of her ability to understand the proceedings, that defendant Crymes had completed three and one-half years of college at Perdue University prior to her arrest. Tr., 5/12/03, at 8.

failing to advise her of the consequences of waiving her appellate rights. In accordance with Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and Platsky v. CIA, 953 F.2d 26, 28 (2d Cir. 1991), the Court has read Crymes's pro se habeas petition liberally. Even on the most generous reading, nowhere does her petition allege that her attorney misadvised her about waiving her appellate/collateral attack rights. Furthermore, Crymes does not state any facts supporting an inference that she received ineffective assistance of counsel with respect to the waiver itself. On the contrary, the plea agreement specifically states that "The defendant also acknowledges her complete satisfaction with the representation and advice received from her ... attorney." Plea Agreement Letter [doc. #26] at 7.

Crymes's claims of ineffective assistance of counsel center on her attorney's alleged failure to raise certain issues in support of her suppression motion. She argues that, had her attorney pursued certain Fourth and Fifth Amendment claims effectively, she would have chosen to go to trial rather than plead guilty. However, she does not offer any grounds supporting a conclusion that her attorney "fell below an objective standard of reasonableness," Strickland v. Washington, 446 U.S. 668, 688 (1984), when advising her concerning the waiver of her appellate rights specifically. Crymes's § 2255 petition amounts to nothing more than an attempt to relitigate the suppression motion that

she expressly withdrew upon pleading guilty. Plea Agreement Letter [doc. #26] at 7 ("the defendant also waives any rights to pursue the issues presented in her motion to suppress evidence and statements that is currently pending before the Court."); Tr., 5/12/03, at 26.

B. Hearing

The statute governing habeas corpus petitions by federal prisoners provides that, "[u]nless the [§ 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. ... A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." 28 U.S.C. § 2255. The Second Circuit approves disposing of a § 2255 motion without hearing where the case records demonstrate the petitioner's claims are bereft of merit or where the records render a full testimonial hearing unnecessary. See Chang v. United States, 250 F.3d 79, 85-86 (2d Cir. 2001).

The record in this case, including the written plea agreement, the transcript of the Rule 11 hearing, and the parties' memoranda, establish that Defendant Crymes is not entitled to any relief, and thus the time and expense attendant

to a full evidentiary hearing are not warranted. In fact, Crymes has not requested a hearing.

III. Conclusion

For the foregoing reasons, Defendant Crymes's Motion Pursuant to 28 U.S.C. § 2255 is DENIED without hearing.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 27th day of October, 2004.